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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 563

A. C. CARSTENS, THOMAS A. LANDRETH, V. R. HYSLOP, H. H. HIGGINS AND THE WASHINGTON WATER POWER COMPANY, A CORPORATION,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF LINCOLN COUNTY, A MUNICIPAL CORPORATION; JOHN LOME, A COMMISSIONER THEREOF; LOUIS SCHULTZ, A COMMISSIONER THEREOF; AND A. H. REILLY, A COMMISSIONER THEREOF.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON, AND BRIEF IN SUPPORT THEREOF.

ANTONE E. RUSSELL,
HENRY E. T. HERMAN,
Counsel for Petitioners.

ALAN G. PAINE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 563

A. C. CARSTENS, THOMAS A. LANDRETH, V. R. HYSLOP, H. H. HIGGINS AND THE WASHINGTON WATER POWER COMPANY, A CORPORATION,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF LINCOLN COUNTY, A MUNICIPAL CORPORATION; JOHN LOME, A COMMISSIONER THEREOF; LOUIS SCHULTZ, A COMMISSIONER THEREOF; AND A. H. REILLY, A COMMISSIONER THEREOF.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON, AND BRIEF IN SUPPORT THEREOF.

The petitioners, A. C. Carstens, Thomas A. Landreth, V. R. Hyslop, H. H. Higgins and The Washington Water Power Company, a corporation, pray that a writ of certiorari issue to review the judgment entered in the Supreme Court of the State of Washington, the highest Court of said State, in the above entitled matter, which judgment is

entered upon an opinion not yet officially reported, but which has been printed in 108 Wash. Dec. 90, and in 111 Pac. (2d) 583.

Summary Statement of the Matter Involved.

The petitioners A. C. Carstens, Thomas A. Landreth and V. R. Hyslop are resident taxpayers and voters of Spokane County, Washington. The petitioner H. H. Higgins is a resident voter and taxpayer in the City of Hartline, Grant County, Washington. The petitioner The Washington Water Power Company is a Washington corporation at the present time engaged in the business of selling electricity in various parts of the State of Washington, including those areas in which the other petitioners live and purchase electric current.

The respondent Public Utility District No. 1 of Lincoln County is a municipal corporation organized under the laws of the State of Washington for the purpose of selling and distributing electric power. Its territorial limits are co-extensive with the boundaries of Lincoln County. The other respondents are the commissioners of the said Public Utility District.

The petitioners brought suit as plaintiffs in the Superior Court of the State of Washington seeking to enjoin the respondents from proceeding with a condemnation suit whereby the respondent public utility district was attempting to condemn distribution lines and facilities for selling electric current outside of its territorial limits in the areas where the individual petitioners reside and purchase electric current. The Superior Court granted the plaintiffs (petitioners here) an injunction enjoining the public utility district and the commissioners thereof from proceeding with their attempt to condemn distributing lines and facilities of the petitioner The Washington Water Power Company in areas outside the territorial limits of said public

utility district (R. 54). The judgment of the Superior Court granting the plaintiffs the relief prayed for was appealed to the Supreme Court of Washington. That decision was reversed by the Supreme Court and a final judgment denying plaintiffs (petitioners here) the relief sought was entered (R. 142). The opinion of the Supreme Court of Washington upon which such judgment was entered is not yet officially reported, but is printed in 108 Wash. Dec. 90, and in 111 Pac. (2d) 583. This judgment of the Supreme Court of the State of Washington petitioners seek to have reviewed here.

Jurisdictional Statement.

Statutory Provisions Believed to Sustain Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A., Section 344 (b), Judical Code, Sec. 237, Amended, (R. S. secs. 690, 709; Mar. 3, 1911, c. 231, secs. 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 937).

State Statute Involved

The validity of Remington's Revised Statutes, Section 11610 (d), Laws of Washington, 1931, Section 6, pp. 12, 13, as construed by the Supreme Court of the State of Washington in its opinion not yet officially reported, but set forth in 108 Wash. Dec. 90, and in 111 Pac. (2d) 583, a copy of which opinion is appended hereto (R. 110-123), and in the final judgment of said Supreme Court (R. 142) was drawn in question and upheld by that Court. That section purports to give to a public utility district the following power:

> "To purchase, within or without its limits, electric current for sale and distribution within or without its

limits, and to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam or other methods, within or without its limits, for the purpose of furnishing said public utility district, and the inhabitants thereof and any other person, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service charges and price thereof, free from the jurisdiction and control of the director of public works and division of public utilities, in all things, * * * Provided, That it must at all times first make adequate provision for the needs of the district, both actual and prospective."

Date of Judgment.

The date of the judgment of the Supreme Court of Washington (which is the highest court of that State) which it is sought to have reviewed is July 11, 1941.

Nature of the Case and of the Rulings of the Court.

The petitioners A. C. Carstens, Thomas A. Landreth and V. R. Hyslop are resident taxpayers and voters of Spokane County, Washington (R. 89-90). Petitioner H. H. Higgins is a resident voter and taxpayer in the City of Hartline, Grant County, Washington (R. 96). The petitioner The Washington Water Power Company is a Washington corporation at the present time engaged in the business of selling electricity in various parts of the State of Washington, including those areas in which the other petitioners live and purchase electric current (R. 94-95).

Respondent public utility district is a municipal corporation organized and existing under the laws of the State of

Washington for the purpose of selling and distributing electric power (R. 1, 47). Its territorial limits are coextensive with the boundaries of Lincoln County. The other respondents are commissioners of said Public Utility District No. 1 of Lincoln County (R. 77-78).

Petitioners brought suit as plaintiffs in the Superior Court of the State of Washington, seeking to enjoin the respondents from proceeding with a condemnation suit whereby the respondent public utility district was attempting to condemn distribution lines and facilities for selling electric current outside its territorial limits in the areas where the individual petitioners reside and purchase electric current (R. 1).

Hartline, Washington, is in Grant County outside the territorial limits of Public Utility District No. 1 of Lincoln County. The distributing lines and facilities which supply electric current to the City of Hartline, Washington, are owned by The Washington Water Power Company (R. 64-65).

Those petitioners who are resident voters and taxpayers of Spokane County, Washington, are served by distribution lines and facilities owned by petitioner The Washington Water Power Company in a rural section of Spokane County. Along with other residents of their neighborhood, they are supplied with electric current by their joint petitioner, The Washington Water Power Company (R. 90).

All petitioners other than The Washington Water Power Company are voters and taxpayers in the counties in which they reside (R. 89-90, 96).

Petitioners believe that the Supreme Court of Washington in the judgment, the review of which is here sought, held valid and constitutional a statute which petitioners assert and believe violated Section 1 of the Fourteenth Amendment to the United States Constitution.

It is believed by petitioners the following cases sustain the jurisdiction of the Supreme Court of the United States:

Boston & Maine Railway Company v. *Arnburg*, 285 U. S. 234, 52 S. C. 336, 76 L. Ed. 729;
Union Bank & Trust Company v. *Phelps*, 288 U. S. 181, 53 S. Ct. 321, 77 L. Ed. 687.

Grounds for Contention Questions Involved are Substantial.

The Federal questions hereinafter set forth and involved in this suit are substantial. We believe they have never been passed upon by the Supreme Court of the United States. They have to do with the asserted right of a public utility district to acquire and thus remove from the tax rolls (property of municipal corporations being exempt from taxation by virtue of Amendment Fourteen, Washington Constitution) distributing lines and facilities for selling electricity in counties and cities outside the territorial limits of said utility district; to deprive petitioners (without submitting the question to the vote of petitioners and their fellow voters) of the privilege which they enjoy at the present of purchasing their electric current from a taxpayer selling the same under regulations of the State Department of Public Service (public utility districts are by the terms of the statute questioned exempt from control of rates by Department of Public Service), and by requiring petitioners to depend for electrical service upon the public utility district controlled, conducted and managed by commissioners elected by the voters of a district at elections in which petitioners and all other voters residing in the areas served outside the utility district are deprived of the right to vote.

Time, Manner and Method of Raising Federal Questions.

The petitioners herein, as plaintiffs, anticipated when they filed their complaint in the Superior Court, that the

statute in question might be construed by the courts of Washington as it was construed by the Supreme Court of that state in the decision which appellants are seeking to have reviewed. They claimed in their complaint the protection of the Fourteenth Amendment to the United States Constitution by use of the following language:

> "That insofar as Chapter 1, Laws of Washington, 1931, may be construed to be an attempt to authorize public utility districts formed under and by virtue of said chapter to acquire works, plants, transmission and distribution lines for the sale and distribution without the territorial limits of such public utility district and to permit such public utility district to sell, regulate and control the use, distribution, rates, service, charges and price for electric current outside of the territorial limits of such public utility district free from the jurisdiction and control of the Director of the Department of Public Service and the Department of Public Service, it is in violation of the private and pecuniary rights of the plaintiffs herein, in that it offends against, ignores and violates the following constitutional provisions:
>
> " 'No state * * * shall * * * deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'
>
> *Amendment XIV, Constitution of the United States"* (Complaint, R. 8-9).

The complaint filed by petitioners in the superior court, from which the foregoing quotation was taken later became a part of the record before the Supreme Court of Washington.

The Superior Court of the State of Washington, that is, the trial court, gave the statute in question a construction which was not inconsistent with Section 1 of the Fourteenth Amendment to the United States Constitution. It granted judgment (R. 54-56) to petitioners herein in accordance with

its memorandum opinion. A copy of said memorandum opinion is attached hereto. In the course of that opinion the Superior Court said:

> "• • • The formation of such a district is primarily for the purpose of benefiting the people within its boundaries, who had a voice in its establishment and some control over its management. In other words, the people in the District are serving themselves and for such purpose may lawfully acquire facilities or franchises which are reasonably necessary to provide this service. The District may also serve customers outside its boundaries who may freely contract for the purchase of such service. This construction accomplishes the purpose of the law and protects residents outside of the district's territorial limits. It, likewise, prevents the district from condemning and acquiring the facilities used by a public service corporation in serving customers outside of the boundaries of the district. If the Public Utility District acquires all the property reasonably necessary to serve the public it represents, that is, the 'inhabitants thereof,' then, in so doing it has accomplished the main purpose of the law. • • •" (R. 53.)

Appellate procedure in the Supreme Court of the State of Washington is prescribed by statutes and rules of the Supreme Court of Washington. Under the Washington appellate practice, assignments of error are not separately filed, but are set forth in the brief of appellant. See Remington's Revised Statutes, Section 1730, Laws of Washington, 1893, p. 127, section 15; Laws of Washington, 1901, p. 30, section 3. See also, Rules of Supreme Court of Washington, 193 Wash. 24-a.

Petitioners herein did not appeal nor did they cross-appeal from the judgment of the trial court. That appeal was prosecuted by respondents herein (R. 56).

Rule XVI of the Supreme Court of Washington came into effect July 1, 1938. Paragraph 2 of said rule introduced into the Washington appellate practice an innovation, to-wit: a requirement that the brief of appellant should consist of a number of matters, including "statement of questions involved," and that among the matters to be included in the brief of respondents should be "any counter-statement of questions involved including restatement and additional statement". (193 Wash. 24-a.)

Subdivision 4 of said Rule XVI provides:

> "The statement of the questions involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts, or particulars of any kind, and whenever possible each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified, or not answered by the superior court. * * * The questions and answers in their entirety should not ordinarily exceed one page and must never exceed two pages." (193 Wash. 24-a, 25-a.)

Respondents in their brief filed as appellants in the Supreme Court of the State of Washington, set forth the following assignments of error, pursuant to the requirements of the statutes and rules of the Supreme Court above set forth;

> "1. The Court erred in the making of its memorandum decision.
>
> "2. The Court erred in refusing to dismiss the Complaint.
>
> "3. The Court erred in signing, making and entering its decree restraining petitioner from acquiring certain distribution properties located adjacent to Lincoln County in Spokane and Grant counties." (Certificate, Chief Justice Washington Supreme Court, R. 108.)

Respondents herein, as appellants in the Supreme Court of Washington, made the following statement of question involved:

> "1. Does Chapter 1, Laws of 1931, authorize a public utility district to acquire, in connection with the acquisition by eminent domain of existing electrical transmission and distribution properties located within such district and as incidental to such acquisition, that portion which is located in an adjoining county of distribution lines extending into such adjoining county from a substation located within such district?"

Believing the foregoing statement of question involved to be incorrect, these petitioners as respondents in the Washington Supreme Court, made the following counter-statement of question involved:

> "1. Has a county-wide public utility district formed under Chapter 1 of the Laws of 1931 the right to acquire by condemnation the electrical distribution services, serving customers, even whole cities, located outside of the county and without the consent or approval of such cities or customers?" (Certificate, Chief Justice Washington Supreme Court, R. 109.)

It will be observed that in making this counter-statement of question, counsel for petitioners when thus raising the Federal question involved were limited by the necessity that the statement be made "in the briefest and most general terms, without names, dates, amounts, or particulars of any kind," as required by subdivision 4 of Rule XVI, Rules of the Supreme Court of Washington, 193 Wash. 24-a, 25-a.

Remington's Revised Statutes, Section 1736, Laws of Washington, 1893, Section 21, page 130, provides that in cases before the Washington Supreme Court the cause shall be determined by the record on appeal. No provision exists

in the statutes of Washington or the rules of the Supreme Court of that State whereby the respondent, who does not cross appeal, can raise any question in the course of an appellate proceeding, save by means of the aforementioned Rule XVI, and subject to its limitations.

This cause was argued before Department Two of the Supreme Court of the State of Washington (R. 110). March 25, 1941, Department Two of the Supreme Court of Washington rendered its opinion (R. 110-123). A copy of said departmental opinion is attached hereto. This opinion was not the final judgment of the Washington Supreme Court. See *Puget Sound Power & Light Company* v. *King County*, 264 U. S. 22, 68 L. Ed. 541, 44 Sup. Ct. 261.

This opinion said nothing about the Fourteenth Amendment to the United States Constitution, but disposed of such rights and immunities as petitioners claimed by reason of the Fourteenth Amendment.

After the opinion of Department Two of the Supreme Court was filed, and before judgment was entered by said court, petitioners herein filed a petition requesting the Supreme Court of Washington to pass upon the Federal question involved in the cause (R. 123). This petition was denied June 4, 1941, prior to the entry of final judgment by the Supreme Court of Washington (R. 141). The Supreme Court of Washington entered the final judgment which these petitioners were seeking to have reviewed by certiorari July 11, 1941.

The question whether it was actually necessary for the respondent public utility district to acquire distributing lines and facilities outside of its territorial limits was raised in the complaint (R. 1-11), discussed in the memorandum opinion of the trial court (R. 52-54) and passed upon by the departmental opinion of the Supreme Court of Washington (R. 110-123).

We believe the Federal questions were timely raised in accordance with the rule recognized by the following cases:

People of State of New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 67, 49 S. Ct. 61, 73 L. Ed. 184, 62 A. L. R. 785;

Green Bay & Miss. Canal Co. v. *Patten Paper Co.*, 172 U. S. 58, 67, 68, 19 S. Ct. 97, 43 L. Ed. 364;

Crowell v. *Randell*, 10 Pet. 368, 392, 398, 9 L. Ed. 458;

Furman v. *Nichol*, 8 Wall. 44, 56, 19 L. Ed. 370;

St. Louis, I. M. & S. Ry. Co. v. *Starbird*, 243 U. S. 592, 598, 599, 37 S. Ct. 462, 61 L. Ed. 917;

Neilson v. *Lagow*, 12 How. 98, 109, 110, 13 L. Ed. 909;

Whitney v. *People of State of California*, 274 U. S. 357, 360, 47 S. Ct. 641, 71 L. Ed. 1095;

Powell v. *Supervisors of Brunswick County*, 150 U. S. 433, 440, 14 S. Ct. 166, 37 L. Ed. 1134;

Sayward v. *Denny*, 158 U. S. 180, 184, 15 S. Ct. 777, 39 L. Ed. 941;

Wedding v. *Meyler*, 192 U. S. 573, 581, 24 S. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833;

Yazoo & M. V. R. Co. v. *Adams*, 180 U. S. 41, 48, 21 S. Ct. 256, 45 L. Ed. 415;

California Bank v. *Kennedy*, 167 U. S. 362, 365, 366, 17 S. Ct. 831, 42 L. Ed. 198;

Dewey v. *Des Moines*, 173 U. S. 193, 199, 19 S. Ct. 379, 43 L. Ed. 665;

Hamilton Mfg. Co. v. *Massachusetts*, 6 Wall. 632, 636, 18 L. Ed. 904;

Oxley Stave Co. v. *Butler County*, 166 U. S. 648, 657, 17 S. Ct. 709, 41 L. Ed. 1149.

Questions Presented.

Does the construction given Laws of Washington, 1931, pp. 12, 13, Remington's Revised Statutes, Section 11610 (d), by the judgment of the Supreme Court of Washington in the

case at bar deprive petitioners of the protection against property being taken without due process of law guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution when such construction permits a public utility district to acquire by condemnation distribution lines and facilities for the distribution of electricity when the effect of such acquisition is to remove valuable property from the tax rolls of the counties in which petitioners live, the said counties being beyond the territorial limits of the public utility district which is permitted to acquire such property and by such acquisition require said property to become tax exempt?

Does the construction given Laws of Washington, 1931, pp. 12, 13, Remington's Revised Statutes, Section 11610 (d), by the judgment of the Supreme Court of Washington in the case at bar deprive petitioners of equal protection of the law guaranteed them by Section 1 of the Fourteenth Amendment to the United States Constitution when such construction permits a public utility district to condemn distribution lines and facilities outside its territorial limits, thereby in effect requiring the resident of such territory to receive their electrical service from a body which is not supervised by the Department of Public Service of the State of Washington as are private companies, or over which they cannot exercise any right of control by the ballot box as can the citizens who live within the territorial limits of the public utility district?

Reasons Relied on for Allowance of the Writ.

We believe that in the case at bar the Federal questions above set forth were fairly presented by the record, were necessary to determination of the cause, and that no adequate non-Federal ground of decision appears in the opinion.

In making the decision sought to be reviewed, the State Supreme Court of Washington has, we believe, decided in

substance Federal questions not previously determined by the Supreme Court of the United States.

There are many public utility districts other than respondent public utility district which have been organized in the State of Washington and in other States of the Union, and it is important that this Court should pass upon the questions hereinbefore set forth.

Conclusion.

We believe the questions which this application suggests should be definitely settled by this Court. Public Utility Districts are now authorized by the laws of several states. There are many in Washington. If notwithstanding the provisions of the Fourteenth Amendment to the Constitution of the United States such municipal corporations have the power to subject residents of areas beyond the territorial limits to the domination of public utilities controlled by voters who do not reside in the areas so dominated, it would be well to have that fact determined by this Court.

Respectfully submitted,

ANTONE E. RUSSELL,
HENRY E. T. HERMAN,
Attorneys for Petitioners.

ALAN C. PAINE,
Of Counsel for Petitioners.

STATE OF WASHINGTON,
County of Spokane, ss:

ANTONE E. RUSSELL and HENRY E. T. HERMAN, being members of the Bar of the Supreme Court of the United States, and counsel for petitioners herein, do hereby certify that the foregoing petition is well founded and not interposed for delay.

ANTONE E. RUSSELL,
HENRY E. T. HERMAN.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 563

A. C. CARSTENS, THOMAS A. LANDRETH, V. R. HYSLOP, H. H. HIGGINS, AND THE WASHINGTON WATER POWER COMPANY, A CORPORATION,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF LINCOLN COUNTY, A MUNICIPAL CORPORATION; JOHN LOME, A COMMISSIONER THEREOF; LOUIS SCHULTZ, A COMMISSIONER THEREOF; AND A. H. REILLY, A COMMISSIONER THEREOF.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

Petitioners prevailed before the Superior Court of the State of Washington. A copy of the Memorandum Opinion of that Court now on file in the records of the Superior Court of the State of Washington for Lincoln County is appended hereto.

The Supreme Court of the State of Washington, the highest Court of the State, reversed the judgment of the Superior Court of the State of Washington. The majority opinion of the Supreme Court of the State of Washington is not yet officially reported, but is found printed in 108 Wash. Dec. 90, 111 Pac. (2d) 583.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A., Section 344 (b), Judicial Code, Sec. 237, Amended (R. S. secs. 690, 709; Mar. 3, 1911, c. 231, secs. 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 937).

The date of the judgment of the Supreme Court of the State of Washington (the highest court of that State) is July 11, 1941.

A statement of the grounds upon which the jurisdiction of this Court is invoked is set forth in the preceding petition, pp. 3 to 12, to which statement reference is here made for the sake of brevity.

Cases believed by petitioners to sustain the jurisdiction of the Supreme Court of the United States and relied on for the exercise of said jurisdiction are:

Boston & Maine Railway Company v. *Arnburg*, 285 U. S. 234, 52 S. Ct. 336, 76 L. Ed. 729;

Union Bank & Trust Company v. *Phelps*, 288 U. S. 181, 53 S. Ct. 321, 77 L. Ed. 687.

Assignment of Error.

The Supreme Court of the State of Washington erred in entering judgment reversing the judgment of the Superior Court with directions to dissolve the injunction.

Petitioners, by their counsel, hereby specify the said assignment of error in its entirety as the assigned error intended to be urged.

Statement of the Case.

For the sake of brevity we refer to the statements in the preceding petition *re*: Summary Statement of the Matter Involved (Petition, pp. 2-3), and Nature of the Case and of the Rulings of the Court (Petition, pp. 4-5).

ARGUMENT.

The taking of property outside the territorial limits of the public utility district results in such property being removed from the tax rolls and increasing the tax burden of the citizens of the area affected, in violation of the Fourteenth Amendment.

Under Chapter 1, page 3, Laws of 1931, of the State of Washington, Remington's Revised Statutes, Sec. 11606, a public utility district is a "municipal corporation", and under the provisions of the Fourteenth Amendment to the Constitution of the State of Washington, property belonging to municipal corporations is exempt from taxation. When, therefore, a public utility district acquires by condemnation property now belonging to a private utility company in a city or county outside its boundaries, it automatically removes that property from the tax rolls and reduces the base upon which taxes may be levied. The affected areas are left with the alternative of operating on reduced budgets or increasing their tax levies. Either results, in our opinion, in denying them equal protection of the law or depriving them of property without due process of law.

As long as the process of transforming property from private to public ownership is confined to the Public Utility District and is controlled by the voters of such district, the same people are affected, and the result, whether good or bad, is self produced and equally applied, but here

the result is produced by the voters of the Public Utility District and is inflicted upon the citizens outside the limits of the district. The only protection against such discrimination is the Fourteenth Amendment to the Constitution, and the only agency that can apply it is this Court.

The construction given to Chapter 1, pages 12 and 13, Laws of Washington, 1931, Remington's Revised Statutes, Sec. 11610 (d), by the Supreme Court of the State of Washington, denies the equal protection of the law to citizens outside the limits of the public utility district who are forced to take service from a district in whose management and control they have no voice.

Chapter 1, page 7, Laws of 1931 of the State of Washington, Remington's Revised Statutes, Sec. 11608, provides that candidates for public utility district commissioner shall be elected by the voters of the public utility district.

Chapter 1, pages 12 and 13, Laws of 1931 of the State of Washington, Remington's Revised Statutes, Sec. 11610, subdivision (d), grants the public utility district acting by and through its commissioners, the power to sell and distribute within or without its limits "electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges and price thereof, free from the jurisdiction and control of the director of public works and division of public utilities, in all things."

The result of the construction given Chapter 1, pages 12 and 13, Laws of 1931 of the State of Washington, by the decision of the case at bar, is to deny to petitioners herein, who are residents of an area outside of the territorial limits of the public utility district, the equal right to participate in the election of the public utility district commissioners who are responsible for the only electric service that will be

left available to them once the distribution lines of The Washington Water Power Company are condemned.

In order to appreciate the significance and importance of the questions involved in this case, it is necessary to review briefly the situation that exists in the State of Washington. Due to the construction of Bonneville and Grand Coulee dams, the agitation for public ownership of the electric light and power business has greatly increased in recent years. Prior to 1931 cities and towns had the right to engage in the electric business but there was no way by which public ownership could be extended to rural areas. In 1931 an act was passed (Chapter 1, Laws of 1931) by initiative, authorizing the creation of public utility districts. These districts could be county-wide in area, or could embrace less than a whole county, and were authorized, when properly formed, to engage in the electric and water utility business. They could acquire properties by purchase, construction or condemnation. They are governed by a board of three commissioners, elected by the qualified voters living within the territorial limits of the District. Therefore, three commissioners have full and complete power to manage and control the affairs of the district, fix the rates and charges, free from supervision or regulation by anyone.

Of course, county boundaries are not the natural operating boundaries of a utility system, but the law provided for the merger of districts, so that one or more counties or parts of counties could be joined together in one operating system. However, the formation of districts proceeded along county lines until twenty-nine out of the thirty-nine counties in the State now have county-wide public utility districts. These districts are now seeking to acquire physical properties by condemnation of properties of the private utilities.

They are not satisfied with the properties within their own territorial limits, but are extending into other coun-

ties and seeking to take property which to them seems desirable from an operating or revenue-producing standpoint.

The inescapable result of this is, that an operating utility is formed whose customers and service extends over a large area, but commissioners are elected by the inhabitants of a much smaller area. It seems patent that the customer who lives outside the area and is forced to accept the rates and service, without any recourse, save to forego the use of electricity, is denied the equal protection of the law under the Fourteenth Amendment, with the customer inside the public utility district who can express his dissatisfaction or approval thru the ballot box, or the customer of a private company which is regulated by the Department of Public Service. Further, when this property outside is acquired by condemnation against the wishes of both the owner and the customers, it is being taken without due process of law, in violation of the Fourteenth Amendment.

Conclusion.

We appreciate that in this brief we are neither permitted nor expected to argue the merits of the case, but only to present to the courts the reason for granting the Writ. We feel that since the plaintiffs here are citizens who have been denied the right to have a voice in the control of the Public Utility District that is forcing service upon them, that they are denied the equal protection of the laws; that this situation is not unique, but that the problem is becoming more complicated every day, as the Public Utility Districts expand; that soon there will be a hopeless conflict of overlapping authority and intermixing of properties and services that will be expensive, difficult, and may be impossible to unscramble.

As far as we can find, this question has never been before this Court, and due to the growth of this type of district in

Washington, Oregon and other States, a determinative statement of the rights of the districts and of the public as affected by the United States Constitution is a matter of no inconsiderable public concern at the moment. We believe, therefore, that the Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel for Petitioners.

APPENDIX.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF LINCOLN.

No. 11,000.

A. C. Carstens, Thomas A. Landreth, V. R. Hyslop, H. H. Higgins and The Washington Water Power Company, a Corporation, Plaintiffs,

vs.

Public Utility District No. 1 of Lincoln County, a Municipal Corporation, John Lome, a Commissioner thereof, Louis Schultz, a Commissioner thereof, and A. H. Reilly, a Commissioner thereof, Defendants.

Memorandum Opinion.

In this action, plaintiffs seek to enjoin the condemnation by defendant, Public Utility District No. 1, of the works, plants, facilities and franchises used for distribution of electric current in Spokane and Grant Counties, admittedly beyond the territorial limits of the District. However, plaintiffs are not attempting to enjoin the condemnation of the 60,000 volt transmission line in Grant County.

Injunction is a proper remedy where a public utility is attempting to make an appropriation in excess of the power granted by the legislature or where the property sought to be taken is not reasonably necessary for the purpose of the utility district.

20 C. J., Sec. 528—P. 1167.
18 Am. Jur., Sec. 386—P. 1031.

The evidence discloses that there are 138 customers in Grant County and 84 in Spokane County, who will be served by the Public Utility District from sub-stations within the boundary of the district. It is the contention of the District that under the P. U. D. Act it is proper and necessary to acquire these lines and customers although such

acquisition necessitates the District furnishing electric facilities beyond its boundary.

These customers never had any say about the formation of the district; they have not expressed any desire to be included therein; they will be deprived of the protection of the Public Service Department in the matter of the regulation of rates and service; and they will have no voice in the management of the affairs of the district. In fact, these customers in the matter of rates, service and management are, practically speaking, at the mercy of the Commissioners of the District. While the Act gives the District authority to go outside its boundaries, such authorization must be given a reasonable construction and not one which will likely impose burdens upon people outside of the District and deprive them of substantial rights. The formation of such a district is primarily for the purpose of benefiting the people within its boundaries, who had a voice in its establishment and some control over its management. In other words, the people in the District are serving themselves and for such purpose may lawfully acquire facilities or franchises which are reasonably necessary to provide this service. The district may also serve customers outside its boundaries who may freely contract for the purchase of such service. This construction accomplishes the purpose of the law and protects residents outside of the district's territorial limits. It, likewise, prevents the district from condemning and acquiring the facilities used by a public service corporation in serving customers outside of the boundaries of the district. If the Public Utility District acquires all the property reasonably necessary to serve the public it represents, that is, the "inhabitants thereof", then, in so doing it has accomplished the main purpose of the law. If the district contracts with "any other person, including public and private corporations, within or without its limits", for the purchase of electric current, then, it may construct or purchase or condemn and acquire all facilities reasonably necessary therefor. A contract with "any other person" implies freedom of action, discussion of terms and other elements necessary to a meeting of the minds of the parties. This,

in my opinion, is a reasonable construction of the meaning of the Act and one which will give it force and accomplish its objects.

As pointed out by counsel, any other construction would permit the defendant to condemn and acquire the plants and facilities of The Washington Water Power Company at Little Falls and Long Lake located within its boundaries, the transmission lines to Spokane and its franchises and facilities therein, and thereby compel the citizens of Spokane to purchase their power and light from it. It seems clear to me that this result was never intended by the people in adopting the Act.

In my opinion, the evidence establishes the necessity for injunctive relief and it is granted.

FRED H. WITT,
Judge.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 28236.

Department Two.

A. C. CARSTENS, THOMAS A. LANDRETH, V. R. HYSLOP, H. H. HIGGINS and THE WASHINGTON WATER POWER COMPANY, a Corporation, Respondents,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF LINCOLN COUNTY, a Municipal Corporation, JOHN LOME, a Commissioner thereof, LOUIS SCHULTZ, a Commissioner thereof, and A. H. REILLY, a Commissioner thereof, Appellants.

Filed March 25th, 1941.

Involved in this appeal is the right of the public utility district of Lincoln County to take by eminent domain proceedings properties belonging to The Washington Water Power Company which are situated in Lincoln, Grant and Spokane Counties.

On or about December 20, 1939, the commissioners of Public Utility District No. 1 of Lincoln County passed a resolution to acquire by purchase or condemnation properties of plaintiff corporation which were situated in Lincoln County, together with distribution lines located in Grant and Spokane counties. Thereafter, the commissioners caused to be instituted in the superior court of Lincoln County a proceeding in eminent domain, by which they sought condemnation of the properties to which we have just referred. Subsequently, the plaintiffs brought this action to restrain and enjoin the prosecution of the eminent domain proceedings.

By virtue of a stipulation entered into by counsel for the respective parties, a trial was had in which the court considered this case and the application for entry of a decree of public use and necessity in the eminent domain case.

After the trial had been concluded, the court entered its decree to the effect that the defendants did not have the right to acquire the franchises of the company or the properties of the company which were located in Grant and Spokane counties. An injunction was issued which prohibited defendants from proceeding to condemn the franchises of the company or its property in Grant and Spokane counties. Defendants appealed.

The assignments of error are (1) in refusing to dismiss the complaint, and (2) in entering its decree restraining petitioner from acquiring properties of the company located in Grant and Spokane counties.

The record discloses the following facts: Respondent company owns the property sought to be acquired. Respondent A. C. Carstens, Thomas A. Landreth and V. R. Hyslop are citizens, voters, residents and taxpayers of Spokane county. Respondent H. H. Higgins is a citizen, resident, voter and taxpayer of Grant County. Appellants John Lome, Louis Schultz and A. H. Reilly are the commissioners of Public Utility District No. 1 of Lincoln County.

Included in the property sought to be acquired is a 600,000 volt transmission line extending from Coulee City in Grant County to Almira in Lincoln County. Approximately

seventeen miles of this transmission line is located in Grant County west of the Grant-Lincoln County boundary line. No substations are located on the transmission line in Grant county. The first substation on the transmission line is located at Almira in Lincoln county at the end of a transmission line. No objections to the taking of this line were made by respondent company. At the substation located at Almira electricity is transferred for distribution purposes. A number of distribution lines extend from the Almira substation and serve the town of Almira and some rural areas. Two of these lines extend westerly from Almira into Grant county and serve the town of Hartline and some rural areas adjacent thereto. There is a total of approximately ten miles of distribution line located in Grant county. From this line the respondent company sells electricity to about one hundred thirty eight customers, which produced a gross revenue in 1939 of five thousand dollars. The cost of the distribution line is from $1500 to $2000 per mile. The distribution lines are not otherwise connected with other lines in Grant county and if they were not taken by the district it would be necessary to construct about ten miles of new line to connect it with the existing system of the respondent company at Coulee City in Grant County.

Also included in the property sought to be acquired by the district was a substation at Davenport in Lincoln county at which electricity is transformed for distribution purposes. Several distribution lines extend from that substation and serve the city of Davenport, the town of Reardan, and the rural communities. One of these lines extends easterly from Davenport through Reardan, and from there into a small rural portion of western Spokane county. There is a total of fifteen to twenty miles of distribution lines located in Spokane county. From these lines respondent company sells electricity to eighty-four customers, producing an annual gross revenue of about four thousand dollars. These lines are not connected with other distribution lines in Spokane county, and if they are not taken by the district, it will be necessary to construct three miles of the new line to connect with the existing

system of respondent company at a place near Medical Lake in Spokane county.

Transmission lines are such lines as carry a high-voltage electrical current to substations where the voltage is reduced so that it may be conducted to the distribution lines. Distribution lines carry the voltage from the transformers to the place where the current is consumed by the customers.

In this case we are not concerned with the question relative to the condemnation of the transmission lines, for the reason that the respondents admit the right of the public utility district to exercise the power of eminent domain for the purpose of condemning transmission lines outside of the territorial limits of the district, if the transmission lines are necessary to bring electric current to the system of distribution lines situated within the territorial limits of the public utility district. There is no contention in the instant case that any of the transmission lines sought to be condemned by appellants would not be put to a public use or that it was not necessary to condemn the transmission lines sought by appellants.

The purpose of the act is stated in Rem. Rev. Stat., sec. 11605, as follows:

"The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.

In discussing the questions presented in this case, we have in mind that

"The rule of strict construction shall have no application to this act, but the same shall be liberally construed, in order to carry out the purposes and objects for which this act is intended." Rem. Rev. Stat., sec. 11615.

Appellants contend that the acquisition of extraterritorial properties is expressly authorized by the public utility act, Rem. Rev. Stat., sec. 11610(d), and should therefore be allowed. The act gives the districts the following power:

"To purchase, *within or without its limits*, electric current for sale and distribution within or without its limits,

and to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam or other methods, *within or without its limits*, for the purpose of furnishing said public utility district, and the inhabitants thereof and any other perosn, including public and private corporations, within or without its limits, with electric current for all uses, * * *" (Italics ours.)

Respondents, on the other hand, contend that no public use would be served by appellants' acquisition of the distribution lines in Grant and Spokane counties, and that no necessity can be found for a condemnation of those distribution lines.

The question of whether or not a use is a public use is a judicial one, of course, under the provisions of Amendment IX of our State constitution.

However, the determinations of public use by the state or its agencies are entitled to great respect by the courts, since they relate to matters which should and must have been known to the legislature. *New York City Housing Authority* v. *Muller*, 270 N. Y. 333, 1 N. E. (2d) 153. The same approach should be used where, as here, the people of the State have determined the existence of a public use by an initiative vote.

The term "public use" is one which has been examined innumerable times by the courts, but no concise, clear definition thereof has emerged from the mass of judicial language devoted to the subject. Perhaps the best approach to the question is to be found in the following passage from *Dornan* v. *Philadelphia Housing Authority*, 331 Pa. 209, 200 Atl. 834:

"On the whole, although the cases on this subject in Pennsylvania have been comparatively few in number, it may fairly be stated that, while firmly maintaining the principle that private property cannot be taken by government for other than a public use, they justify the conclusion that judicial interpretation of 'public use' has not been circumscribed in our state by mere legalistic formulas or philo-

logical standards. On the contrary, definition has been left, as indeed it must be, to the varying circumstances and situations which arise, with special reference to the social and economic background of the period in which the particular problem presents itself for consideration. Moreover, views as to what constitutes a public use necessarily vary with changing conceptions of the scope and functions of government, so that to-day there are familiar examples of such use which formerly would not have been so considered. As governmental activities increase with the growing complexity and integration of society, the concept of 'public use' naturally expands in proportion."

The generation and distribution of electric power has long been recognized as a public use by this court. *State ex rel. Washington Water Power Co.* v. *Superior Court*, — Wash. Dec. —. The only reason, therefore which respondents can urge as a basis for the contention that the acquisition of the distribution lines here in question would not be for a public use is that they are located beyond the boundaries of the condemnor.

The districts created under this act are constituted municipal corporations. Rem. Rev. Stat., sec. 11606. The general rule relative to this question is that municipal corporations may exercise their power of eminent domain beyond their boundaries if they are given the right to do so by legislative enactment.

"The power of the legislature to authorize a municipal corporation to acquire *lands beyond the municipal limits* and for that purpose to exercise the power of eminent domain cannot be disputed. It has long been recognized to exist where the use for which the property is taken is a proper and reasonable public use." 3 Dillon, Municipal Corporations (5th ed.), 1626, sec. 1028.

"• • • Likewise, a municipality cannot condemn lands within the state but outside its own corporate limits unless the power has been delegated by the legislature. However, it is well settled that the legislature may delegate such power." 4 McQuillan, Municipal Corporations (2nd ed.), 406, sec. 1619.

Respondents urge, however, that this general rule can only apply to instances in which the acquisition is for the direct benefit of the inhabitants of the condemning municipal corporation.

In cases in which municipal corporations have been authorized to acquire privately owned utilities, the public use to which they are to be devoted by the municipal corporation is ordinarily regarded as a higher public use than that to which they were devoted by the private ownership. *State ex rel. Washington Water Power Co.* v. *Superior Court, supra.* Respondents contend, however, that the reason for permitting such condemnation, namely, the fact that public ownership results in greater public use and broader public benefit, is lost when the municipal corporation seeks to condemn property beyond its borders, inasmuch as the inhabitants of the extraterritorial districts have no voice in the control nor any share in the profits of the municipal corporation.

Our study of the cases in this jurisdiction has failed to reveal any case in which a municipal corporation has sought to condemn distribution facilities of privately owned utilities outside its borders, when so authorized to do so by statute.

The case of *Farwell* v. *Seattle*, 43 Wash. 141, 86 Pac. 217, was one in which the city of Seattle attempted to sell water to the city of Ballard, and this Court sustained a judgment which had prevented Seattle from carrying out its project. In doing so we based our position upon the construction and meaning of Bal. Code, sec. 739, which provided:

"To provide for erecting, purchasing, or otherwise acquiring water works, within or without the corporate limits of said city, to supply said city and its inhabitants with water, or to authorize the construction of same by others when deemed for the best interests of such city and its inhabitants, and to regulate and control the use and price of the water so supplied."

The next case on the subject is that of *Spear* v. *Bremerton*, 90 Wash. 507, 156 Pac. 825, in which we called attention to a change in the law and held that a city could sell an

excess of water supply. This Court did, however, hold that a city could not acquire a private water distribution system and its franchises in another city, due to the fact that the legislative enactment did not give that power to the city.

The language of the cited cases reveals that this Court has felt bound by the terms of the statutes which it construed, and has not attempted to lay down any general rule exclusive of the statutory provisions. A comparison of the statutes construed in those cases with the one we have before us brings to light an entirely different situation than obtained in the cited cases. The present act is explicit in stating that public utility districts may acquire by condemnation facilities for sale of power to persons outside the districts, and that the property so acquired may be located outside the districts.

We therefore must turn our search to cases outside this jurisdiction to determine whether or not such authorized condemnation of outside distribution facilities is regarded as a legal exercise of the power of eminent domain for public use.

In *Public Service Co.* v. *City of Loveland*, 79 Colo. 216, 245 Pac. 493, the city, in eminent domain proceedings, sought to condemn an electric light system owned and operated by a privately owned corporation. Most of the property was in the city, with a small portion located without the boundaries of the city. In dealing with the question of the right of the city to condemn the property which was outside the city limits, the court held that such distribution facilities might be taken, and were for the public use.

Again, in *Colorado Central Power Co.* v. *City of Englewood*, 89 F. (2d) 233, in dealing with the right of the city to condemn outside distribution facilities in conjunction with the condemnation of the plant within the city, the court stated:

"A city of the second class in Colorado is vested with power of eminent domain for the acquisition of private property necessary for the construction and operation of water, gas or light works; and the power is not confined to property situated within the city limits. Property out-

side the city may be taken for such public use if it is needed. Public Service Co. *v.* City of Loveland, 79 Colo. 216, 245 P. 493. Whether the contemplated use is public is a judicial question. Article 2, section 15, Colorado Constitution. If it is public, the necessity or expediency of devoting the property to it is a question for the determination of the city, and when subject to inquiry it must be determined by a board of commissioners appointed by the court. If that determination is not made arbitrarily, or capriciously or in bad faith, it is conclusive and not subject to judicial review. • • •

"The fact that the company is now using the property outside the city limits to furnish its customers with electric energy is not enough to withstand the power of the city to acquire it for the purpose of establishing and operating a municipal system. A city may condemn property of a utility company in use as a part of the system which serves consumers within the city for the purpose of devoting it to a municipal plant. Public Service Co. *v.* City of Loveland, supra. That construction of the controlling provisions of the State Constitution and statutes is binding on us. And our decision in the City of Norton *v.* Lowden, supra, (84 F. (2d) 663) does not lead to a contrary conclusion. It was there said that the power to destroy or materially interfere with an existing public use of property for another public use, must be found in specific legislative authority; and it was noted that many states had authorized condemnation where the second use is found to be more essential to the public welfare. There is such legislative authority in Colorado. It was so held in the City of Loveland Case (79 Colo. 216, 245 Pac. 493)."

In Paris Mountain Water Co. *v.* City of Greenville, 110 S. C. 36, 96 S. E. 545, the court held that a city might condemn outside water distribution facilities under a statute which gave cities the right to serve outside communities contiguous to the city. In the course of its opinion, the court stated:

"It is a matter of common knowledge that generally the water supply and reservoirs and lead pipes of many towns are of necessity many miles without the corporate limits.

It is also a matter of common knowledge that many of the towns of the State, and chief amongst them Greenville, are surrounded by manufacturing plants domiciled just out of the corporate limits, and by suburban villages operated under separate charters, and divided off from the city by an arbitrary line.

"The suggestion of appellant that the city will go into 'municipal trading,' condemned by Mr. Dillon, does not raise a question of law, but of policy, and that policy has been determined by the Constitution and by the legislature."

In the case of Potts *v.* City of Atlanta, 137 Ga. 211, 73 S. E. 397, the court permitted the condemnation of sewer facilities outside the city limits, such acquisition being authorized by the legislature. The court stated that the construction of sewers is of such benefit to public health, welfare, and comfort that it is undeniably a public use. The court did not find it any less so because the sewers were to be partly outside the city's boundaries.

In New Jersey Water Service Co. *v.* Borough of Butler, 105 N. J. L. 40, 143 Atl. 759, the water distribution system which served the condemning borough also served other boroughs, and the condemnor sought to acquire the outside portion of the system along with that which was within its borders. The legislature had authorized the acquisition of such external systems. The court approved the condemnation, basing its conclusions on the impracticability of dismembering the unitary system so as to render the external portions useless, due to being cut off from the source of supply.

The Supreme Court of the United States, in the case of Omaha *v.* Omaha Water Co., 218 U. S. 180, 54 L. Ed. 991, 30 S. Ct. 615, dealt with the power of a city to acquire distribution facilities beyond its borders. The enumerated powers of the city permitted it to acquire outside facilities, the charter providing:

"* * * power to appropriate any waterworks system, plant or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying within said city or in part without the city

and within ten miles from the corporate limits of such city * * *"

The reasons given by the court for upholding the right of the city to acquire an operative water plant within and without the city are so compelling that we set out the following excerpt from the opinion:

"* * * The review of the legislation touching the power of the city, and the conclusion of the Circuit Court of Appeals from that legislation, that the city had the power to acquire the system as it existed, and has the power to operate so much of it as is intended to supply the suburban towns adjacent which may be acquired, is full and satisfactory, and meets our approval.

"We are also satisfied with the conclusion of the Circuit Court of Appeals that the acquisition of the system as it existed at the time the city made its election to purchase was within the contemplation of both the city and the water company, and that the valuation of the system as an entirety was the matter which the appraisers were required to do. What we shall say upon this point will support our conclusion as to the power of the city, for the legislation upon that matter must be read in the light of the subject-matter and of all the known local conditions. The most weighty fact in this connection is, that the system was one single system, having a common source of supply and common main connections therewith. Its dismemberment is not to be thought of unless it is clear that the ordinance exercising the option is so plainly limited to the purchase of only so much of the distributing system as lay wholly within the corporate limits as to admit of no other meaning."

The case of South Pasadena *v.* Pasadena Land & Water Co., 152 Cal. 579, 93 Pac. 490, held that a city, when authorized, could acquire a distribution system extending into another city's territory, where the whole system was a unit and where to do otherwise would cut off the portion in the outside territory without a source of supply. The court held that it was convenient to acquire the system as a unit in order to accomplish the main purpose of supplying water to those within the city.

The court in Plainfield-Union Water Co. *v.* Inhabitants of City of Plainfield, 83 N. J. L. 332, 85 Atl. 321, held that the city could not condemn part of a water distribution system running through the city under an act which only authorized it to condemn systems for its own supply, due to the fact that it would be depriving other cities of their supply, and no authority to do so was given by the act. Clearly, the legislative enactment there was far narrower than that in the case at bar, but we deem the following language of the court worthy of quotation, inasmuch as it expresses the principle which induces courts to uphold such condemnations of the outside portions of utility systems, when authorized by statute:

"The legislature cannot be supposed to have contemplated a dismemberment of a water company's plant in such a way that a part of it would be rendered useless; useless to the condemning municipality since it could not acquire that part, and useless to the company because it would be cut off from the source of supply."

The court in that case recognized that a statute authorizing the condemnation of the outside facilities could have been passed by the legislature, but stated that no such right had yet been granted.

From all of the cases discussed we conclude that where an electric power distribution system owned by a private utility company incidentally overlaps into an adjoining county, and where the overlapping portion would be severed from its source of supply if not also acquired, the authorized acquisition thereof in conjunction with the acquisition of the main system in the condemnor's county is an acquisition for the public use, it being for the interest of the public to maintain the system as a unit, instead of cutting off the small overlapping portion from the source of supply. This in no way conflicts with our earlier cases, and is founded on a practical view of the meaning of "public use." We do not feel that "public use" should necessarily be measured in terms of arbitrary political lines, but should be interpreted in the light of the exigencies and facts present in the individual case.

The contention of respondents that no greater public use will be served by the acquisition of the external distribution lines than is now being served by the privately owned corporation, due to the inability of the inhabitants of the outside territory to share in the profits of the operations, is of no consequence, due to the fact that a municipally owned enterprise of this nature may not be operated for profit, and must establish its rates at the lowest possible point. Uhler *v.* Olympia, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998.

Nor is the fact that the outside persons have no control over the management of the district a sufficient ground for finding that no greater public use is served by acquiring the lines for the district. The control which will be exercised by those in charge of the district's affairs must be for the benefit of the users of the electricity, and there is no basis shown for a conclusion that the outside purchasers will reap any less benefits as a result of their inability to participate in the management.

As for the matter of the necessity of condemning this property, it is the rule that a municipal corporation's determination of necessity in these cases is conclusive upon the courts in the absence of fraudulent, arbitrary, or capricious action by the condemnor. State ex rel. Washington Water Power Co. *v.* Superior Court, — Wash. Dec. —. We are unable to find any evidence in the record to support a conclusion that any action of the enumerated types is present in the case at bar. We believe there were valid grounds for a belief on the part of the condemnor that a reasonable necessity existed for acquiring the incidental portions of the line which lay beyond the political boundaries of the district, and we therefore cannot interfere with the district's determination of necessity.

The individual respondents' next contention is that to permit the district to condemn the outside lines is in violation of Article 1, sec. 19, of our state constitution, which reads:

"All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

They cite the case of Malim *v.* Benthien, 114 Wash. 533, 196 Pac. 7, as authority for their position. We are of the opinion, however, that the case is not in point. The basis for the holding in that case was that the statute in question, dealing with diking districts, permitted the districts to levy taxes upon the outside property without the consent of the owners thereof, and without giving those persons either vote or voice relative to the imposition of the taxes. In other words, the case held that the statute permitted taxation without representation, and therefore was unconstitutional.

In the case at bar, however, we are confronted with a statute which permits no such a practice as was dealt with in Malim *v.* Benthien, *supra.* The mere fact that the electors in the district are authorized to condemn the outside property of the private utility company without the electors in the outside territory being able to vote thereon is not comparable to the imposition of taxes, since such persons have no property right in the existing service which they receive from the private utility company. Paris Mountain Water Co. *v.* City of Greenville, supra.

We are of the opinion that the fact that the condemnation of the property in the outside counties will take that property off the tax rolls of those counties, since property of the districts is not taxable, is too indefinite a matter to constitute a basis for applying the rule of Malim *v.* Benthien. The minute losses which the individual customers might suffer as a result of the removal of the property from the tax rolls would probably be counteracted by savings realized in power rates.

Nor does the fact that the customers in the outside counties would, without voting, no longer have their service and rates regulated by the Washington department of public service constitute a valid reason for holding the statutory authorization unconstitutional, since we cannot assume that the district would perform the service less fairly or reasonably than would be the case if the utility were supplied under the regulations of the department. Obviously, the people of the state, in passing the act in question, showed that they were willing that the public utility districts

should supplant the department of public service where systems are condemned, and that such a supplantation would conform with public policy.

For the foregoing reasons, we conclude that Article 1, sec. 19, of our state constitution would not be violated by permitting the condemnation of the distribution lines outside the condemnor's political boundaries without the residents of the outside counties voting thereon. The effect of such condemnation upon the residents of the outside counties is only incidental, and does not interfere with their property rights, as was the case in Malim *v.* Benthien, *supra.*

In concluding, we wish to call attention to the fact that respondents have stated in their brief that if we were to permit appellants to condemn the outside lines in the case at bar, it would make it possible for some small county adjoining a large county, such as Spokane county, to condemn the entire power system in the larger county, and to impose its control and management upon the extensive service in the larger county. Respondents contend that such a result would be extremely unreasonable, and should not be permitted. We wish to point out, however, that our holding in the case at bar is confined to the factual situation before us, namely, a situation in which the outside lines are only incidental to the main portion of the system which is located in the condemnor's boundaries and that we express no opinion relative to a situation suggested by respondents.

The judgment of the trial court is reversed, with instructions to dissolve the injunction and enter an order of public use and necessity.

SIMPSON, *J.*

We concur:

ROBINSON, *C. J.*,
BEALS, *J.*,
JEFFERS, *J.*,
MILLARD, *J.*

APPENDIX.

Chapter 1, Laws of Washington, 1931, Page 3, Section 2, Also Cited as Remington's Revised Statutes, Section 11606.

"Sec. 11606. Districts authorized. Municipal corporations, to be known as public utility districts, are hereby authorized for the purposes of this act and may be established within the limits of the State of Washington, as provided herein."

Chapter 1, Laws of Washington, 1931, Pages 6, 7, 8 and 9, Section 4, Also Cited as Remington's Revised Statutes, Section 11608.

"Sec. 11608. Canvass of returns—Commission—Qualifications—Terms—Formation expenses—Vacancies—Quorum—Change of boundaries—Hearing. Within five days after such election, the election board of the county shall canvass the returns, and if at such election a majority of the voters voting upon such proposition shall vote in favor of the formation of such district, the election board shall so declare in its canvass of the returns of such election, and such public utility district shall then be and become a municipal corporation of the State of Washington, and the name of such public utility district shall be Public Utility District No. — of — County. The powers of the public utility district shall be exercised through a commission consisting of three members, one from each of the three county commissioner districts of the county in which the public utility district is located, when the public utility district is coextensive with the limits of such county. When the public utility district comprises only a portion of the county, three commissioner districts, numbered consecutively, having approximately equal population and boundaries, following ward and precinct lines, as far as practicable, shall be described in the petition for the formation of the public utility district, and one commissioner shall be elected from each of said commissioner districts. No person shall be eligible to hold the office of public utility district commissioner un-

less he is a qualified voter and a freeholder within such public utility district, and is and has been a resident for a period of three years, except as hereinafter provided, of the commissioner district from which he is elected.

"Public utility district commissioners shall hold office for the term of three (3) years and until their respective successors are elected and qualified, each term to commence on the fourth Tuesday in March in each year in Class A counties and counties of the first class, and in all other counties on the second Monday in January in each year, following the election thereto. At the same election at which the proposition is submitted to the voters as to whether a public utility district shall be formed, three (3) commissioners shall be elected to hold office, respectively, for the term of one, two and three years. All candidates shall be voted upon by the entire public utility district, and the candidate residing in commissioner district number one receiving the highest number of votes in the public utility district shall hold office for the term of three (3) years; and the candidate residing in commissioner district number two receiving the highest number of votes in the public utility district shall hold office for the term of two (2) years, and the candidate residing in commissioner district number three receiving the highest number of votes in the public utility district shall hold office for the term of one (1) year, each of said terms to date from the times specified in this section following the election, but also to include the period intervening between the election and the beginning of the regular terms specified in this section. All expenses of elections for the formation of such public utility districts shall be paid by the county holding such election, and such expenditure is hereby declared to be for a county purpose, and the money paid out for such purpose shall be repaid to such county by the public utility district, if formed. Nominations for public utility district commissioners shall be by petition signed by one hundred (100) qualified electors of the public utility district to be filed in the office of the county auditor not more than sixty (60) days, and not less than thirty (30) days prior to the day of such election: Provided, however, That in any public utility district having

a population of less than four thousand, such nominating petition shall be signed by a number of qualified electors equalling ten (10) per cent or more of the qualified electors of the public utility district. A vacancy in the office of public utility district commissioner shall occur by death, resignation, removal, conviction of a felony, nonattendance at meetings of the public utility district commission for a period of sixty (60) days unless excused by the public utility district commission, by any statutory disqualification, or by any permanent disability preventing the proper discharge of his duty. In the event of a vacancy in said office such vacancy shall be filled at the next general election, the vacancy in the interim to be filled by appointment by the remaining commissioners. If there should be at the same time such number of vacancies that there are not in office a majority of the full number of commissioners fixed by law, a special election shall be called by the county election board upon the request of the remainder, or, that failing, by the county election board, such election to be held not more than forty (40) days after the occurring of such vacancies.

"A majority of the persons holding the office of public utility district commissioner at any time shall constitute a quorum of the commission for the transaction of business, and the concurrence of a majority of the persons holding such office at the time shall be necessary and shall be sufficient for the passage of any resolution, but no business shall be transacted unless there are in office at least a majority of the full number of commissioners fixed by law.

The boundaries of the commissioners' districts shall not be changed oftener than once in four (4) years, and only when all members of the commission are present: Provided, That any proposed change therein must be made by resolution and notice of the time of a public hearing thereon shall be published for two (2) weeks prior thereto: And Provided further, That upon a referendum petition signed by six per cent (6%) of the qualified voters of the public utility district being filed with the clerk, the commission shall submit such proposed change to the voters of the public utility district for their approval or rejection. The check-

ing of said petition as to its sufficiency or insufficiency shall be governed by the provisions in this act relating thereto."

Chapter 1, Laws of Washington, 1931, Pages 12 and 13, Section 6 (d), Also Cited as Remington's Revised Statutes, Section 11610 (d).

"Sec. 11610. (d). To purchase, within or without its limits, electric current for sale and distribution within or without its limits, and to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam or other methods, within or without its limits, for the purpose of furnishing said public utility district, and the inhabitants thereof and any other person, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges and price thereof, free from the jurisdiction and control of the director of public works and division of public utilities, in all things, together with the right to purchase, handle, sell or lease motors, lamps, transformers and any and all other kinds of equipment and accessories of every nature and kind whatsoever necessary and convenient for the use, distribution and sale thereof; Provided, That the commission shall not supply water to a privately owned utility for the production of electric energy, and may supply, directly or indirectly, to privately owned public utilities which sell electric energy or water to the public, any of the surplus electric energy or water under its control, and contracts therefor shall not extend over a longer period than three (3) years: Provided, That it must at all times first make adequate provision for the needs of the district, both actual and prospective."

Fourteenth Amendment to the Constitution of the State of Washington.

"AMENDMENT 14.

"Article VII is amended by striking out all of sections 1, 2, 3 and 4, and inserting in lieu thereof the following, to be known as section 1:

"ART. VII, Sec. 1. The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class: Provided, That the Legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an ad valorem tax at such rate as it may fix, or by both. Such property as the Legislature may by general laws provide shall be exempt from taxation. Property of the United States and of the state, counties, school districts and other municipal corporations, and credits secured by property actually taxed in this state, not exceeding in value the value of such property, shall be exempt from taxation. The Legislature shall have power, by appropriate legislation, to exempt personal property to the amount of three hundred ($300.00) dollars for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual bona fide owner. (L. '29, p. 499, Sec. 1.)

Approved November, 1930."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 563

A. C. CARSTENS, THOMAS A. LANDRETH, V. R. HYSLOP, H. H. HIGGINS and THE WASHINGTON WATER POWER COMPANY, a corporation,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT No. 1 of LINCOLN COUNTY, a municipal corporation; JOHN LOME, a Commissioner thereof; LOUIS SCHULTZ, a Commissioner thereof; and A. H. REILLY, a Commissioner thereof,

Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR A WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Washington is not yet officially reported, but is found printed in 108 Wash. Dec. 90, 111 Pac. (2nd) 583.

JURISDICTION

The jurisdiction of this court is invoked under Title

28, U.S.C.A., Sec. 344 (b), the claim being that there has been drawn in question the validity of a Washington statute on the ground of its being repugnant to Section 1 of the Fourteenth Amendment to the federal Constitution.

Petitioners assert that the state court has decided a federal question. We dispute that the federal questions now presented were decided by the Supreme Court of the State of Washington after having been properly raised by petitioners. This matter will be discussed in the argument below.

STATEMENT OF THE CASE

The facts of the case are stated at length in the opinion of the Court below (R. 110-112). Briefly they are as follows:

The respondent Public Utility District No. 1 of Lincoln County (hereinafter called the District) is a municipal corporation organized and existing pursuant to Chapter I, Laws of 1931 of Washington, with boundaries coextensive with Lincoln County, Washington (R. 11-12), and with authority to construct and acquire, either by purchase or condemnation, and to operate and maintain plants or systems for the furnishing of electrical and water service. It is expressly authorized to exercise the above powers either within or

without its limits (Rem. Rev. Stat. of Washington, Sec. 11610 (d)), but not to issue any bonds or levy any taxes against property outside its limits (Rem. Rev. Stat. of Washington, Sec. 11610 (g)).

In December, 1939, (R. 11-15), the District instituted proceedings in eminent domain to acquire the electrical transmission and distribution properties of the petitioner Washington Water Power Company (hereinafter called the Power Company) located within the District (R. 16), together with a transmission line extending to a source of electrical supply in adjoining Grant County (R. 16) and certain ends of distribution lines extending from the District into adjoining Grant and Spokane Counties (R. 16-17).

The distribution properties which the District sought to acquire in Grant and Spokane Counties were but a small part of the total properties which it sought to acquire and were confined to those distribution lines which were served from substations within the District and which were adjacent and incidental thereto and operated as a part of and in conjunction therewith (R. 68-69), and which, if severed from the properties within the District, could not have been served by the Power Company without the construction of considerable additional electrical lines to connect the same with the existing system of the Power Company (R. 65-66).

In the eminent domain proceedings the District in due course made application for entry of a decree of public use and necessity. Prior to the hearing thereon the petitioners instituted this proceeding (R. 1-11) in the Superior Court of Lincoln County seeking an injunction to restrain the District and its Commissioners from acquiring any of the distribution properties of the Power Company located in either Grant or Spokane Counties.

Petitioners Carstens, Hyslop and Landreth are residents of Spokane County and customers of the Power Company served from the distribution properties aforesaid in Spokane County (R. 89-90), and petitioner Higgins is a resident of Grant County and a customer of the Power Company served from the distribution properties aforesaid in Grant County (R. 96). None of these individuals was sufficiently interested in the proceeding to do more than lend his name thereto. (R. 90-91, 96).

Pursuant to stipulation between counsel for the respective parties trial was had in the injunction proceedings at the same time and together with the hearing on the application for entry of a decree of public use and necessity in the eminent domain proceedings (R. 58).

At the conclusion of the trial the Trial Court took the matter under advisement and thereafter rendered its memorandum decision (R. 52) that the District was without power under Chapter I, Laws of 1931 of Washington, to acquire the distribution properties located in Grant and Spokane Counties, and subsequently a decree was entered in accordance therewith (R. 54). The District appealed to the Supreme Court of Washington from said decree (R. 56), and on such appeal the decision, for which a review is sought in this proceeding, was rendered reversing said decree (R. 110-123).

ARGUMENT

Summary

The individual petitioners are only nominal parties. The corporation petitioner is not an injured party with respect to its claim under the equal protection clause.

We will also contend that no federal question has been decided by the court below because only in their complaint in the trial court did petitioners make any reference to any federal question. They failed to raise the question in the appellate court, and the appellate court's opinion discussed no federal question. They failed to adequately present any federal question to this court.

We will contend that neither of the questions presented by petitioners are federal questions of substance because this court has already determined the applicable principles.

Jurisdiction

This court should not assume jurisdiction on the ground that the constitutional rights of the individual petitioners are involved, since these petitioners are merely nominal parties, and the party actually interested in pressing these claims is the corporation petitioner. See:

Smith v. Indiana, 191 U. S. 138, 24 Sup. Ct. 51, 48 L. Ed. 125.

The corporation petitioner has no standing in this court to challenge the state statute on the ground that, as construed by the court below, it denies equal protection of the laws, since the petitioner is not an injured party and only those injured may complain.

See the concurring opinion of Justice Brandeis in *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 347, 56 Sup. Ct. 466, 80 L. Ed. 688.

The federal questions which petitioners claim were raised below and decided were not adequately raised or presented, and were not decided:

(1) The allegations of the complaint concerning federal questions are too vague and uncertain. See:

Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 53 Sup. Ct. 32, 77 L. Ed. 180.

(2) The record fails to disclose that the questions were presented to the trial court.

(3) The record fails to disclose that the questions were presented to the state supreme court and there is nothing in the opinion rendered by that court to indicate that it considered any federal questions (R. 110). The state court rules discussed by petitioners relate only to the form in which questions may be presented and do not prevent a respondent before that court from clearly presenting in his counter-statement of questions every question, state or federal, which he considers to be involved (Rule XVI, subd. 4, Supreme Court of Washington, 193 Wash. 24-a, 25-a).

The failure of petitioners in this respect should, in itself, be deemed sufficient for denial of the writ. Federal claims may not be prosecuted piecemeal in the state and federal courts.

American Surety Co. v. Baldwin, 287 U. S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231.

(4) A claim first made on petition for rehearing that a federal question is involved cannot serve as the basis of review in this court.

American Surety Co. v. Baldwin, 287 U. S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231.

The petitioners in this case made some claim in their complaint that federal questions were involved, but did not raise this question again until after the decision in the Supreme Court of the state, and for this reason their claim should be disregarded and the rule stated above applied.

The federal questions which petitioners claim to be involved have not been adequately presented to this court.

Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 53 Sup. Ct. 32, 77 L. Ed. 180.

Questions Presented Not Federal Questions of Substance

There is no federal question "substantial in character" when decisions of this court have already established the principles applicable to the matter presented.

Zucht v. King, 260 U. S. 174, 43 Sup. Ct. 24, 67 L. Ed. 194.

No Violation of Due Process Because Condemned Property Taken Off Tax Rolls

The first question presented by petitioners is whether they will not be deprived of property without due process of law by a construction of Remington's Revised Statutes of Washington, Sec. 11610 (d), which

according to petitioners, "permits a public utility district to acquire by condemnation distribution lines and facilities for the distribution of electricity when the effect of such acquisition is to remove valuable property from the tax rolls of the counties in which petitioners live, the said counties being beyond the territorial limits of the public utility district which is permitted to acquire such property and by such acquisition require said property to become tax exempt".

Petitioners do not here specify of what property they have been deprived. In one place in their brief they state that the result of the condemnation of distribution lines by the public utility district, whose property is not subject to ad valorem taxation, will be to remove the property from the tax rolls and thus increase the tax burden of citizens of the area.

Such an increase of the tax burden of petitioners is not a deprivation of their property without due process of law. See:

> *Hunter v. Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40. 52 L. Ed. 151.

In another place in the argument in their brief petitioners base the claim that they as taxpayers and citizens are deprived of property without due process of law upon the statement that a county in which such outside distribution lines are located is deprived of

equal protection of law *or* deprived of property without due process of law when it can no longer levy ad valorem taxes on the condemned distribution lines. No such county is a party to this action. Nor did petitioners in their complaint in the trial court make any claim on behalf of such a county. Nor do they present to this court any question on behalf of a county.

If the county itself, rather than a mere taxpayer, were complaining, this court would hold that no substantial federal question was presented. See:

> *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 61 Sup. Ct. (Adv. Op.) 1050, 85 L. Ed. (Adv. Op.) 977.

While petitioners' assertion that they are being deprived of property without due process by the fact that the public utility district's eminent domain proceeding will result in taking property off the tax rolls is related by petitioners to the particular type of property located in the county in which they live, namely, distribution lines which are outside the territorial boundaries of the condemning public utility district, the circumstance that the properties they discuss are distribution lines and the circumstance that they are outside the territorial boundaries of the public utility district are purely adventitious when considered in relation to the constitutional claim being made. The

claim appears frivolous and utterly devoid of merit when it is considered that it could as well be made as to outside transmission lines and yet in the Supreme Court of Washington, as is stated in the opinion of that court, petitioners admitted the right of the public utility district to condemn transmission lines for bringing current to the distribution lines located within the territorial limits of the district (R. 111).

Denial of Equal Protection

The second question presented by petitioners is whether the construction of Remington's Revised Statutes of Washington, Sec. 11610 (d), permitting a public utility district to condemn distribution lines and facilities outside its territorial limits, deprives petitioners of equal protection of the law. Petitioners elaborate this point by the statement that the statute as construed "in effect" requires the residents of the territory served by such distribution lines and facilities "to receive their electrical service from a body which is not supervised by the Department of Public Service of the State of Washington as are private companies, or over which they cannot exercise any right of control by the ballot box as can the citizens who live within the territorial limits of the public utility district."

In the brief supporting the petition, petitioners make

it clear that there are two independent claims of denial of equal protection. One is that because he cannot vote at the election of public utility district commissioners, the outside customer is denied equal protection with the customer living within the territorial limits. The other is that because the public utility district is not regulated by the state department of public service, the outside customer is denied equal protection with customers of private companies which are so regulated.

That the claim that the right to vote at the election of the commissioners of the public utility district is guaranteed to a customer of the public utility district by the equal protection clause is not substantial in character is indicated by the holding in *Soliah v. Heskin*, 222 U. S. 522, 32 Sup. Ct. 103, 56 L. Ed. 294.

The difference in the matter of the right to vote between citizens within and citizens without the public utility district is paralleled by differences in obligations and burdens. The district cannot issue any bonds or levy any taxes against property outside the district. (Rem. Rev. Stat. of Washington, Sec. 11610 (g)).

As to the claim that lack of regulation of the public utility district denies its customers equal protection with the customers of private companies, see:

Springfield Gas & Electric Co. v. Springfield, 257 U. S. 66, 42 Sup. Ct. 24, 66 L. Ed. 131.

It has not been proved, and this court will not assume that the rates charged by the public utility district will be any higher than the rates charged by a privately owned utility whose rates are controlled by the state public service commission.

CONCLUSION

This case involves the right of a municipal corporation to take distribution lines lying outside of its territorial limits but incidental and adjacent to properties being taken which are located within the territorial limits. This is a right which has been frequently exercised by such bodies. Petitioners' attack upon it in this case is wholly without merit. The petition should be denied.

Respectfully submitted,

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